ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Implementation of Sections 12 and 19 of the Cable Television Consumer and Competition Act of 1992	)))	MM Docket No. 92-262

COMMENTS OF NATIONAL CABLESYSTEM ASSOCIATES

INTRODUCTION

National CableSystems Associates (Associates) is the owner and operator of eighteen satellite master antenna television or SMATV systems in the Atlanta metropolitan area serving a total of 3,000 subscribers. As such, it is a multi-channel video programming distributor as that term is defined in the Cable Television Consumer Protection and Competition Act of 1992, Public Law 102-385. Insofar as it seeks to obtain and enter into agreements to provide cable television service to owners of apartment complexes and other multi-family residential communities in the metro Atlanta area, Associates competes both directly and indirectly with a number of other multi-channel video programming distributors, including other SMATV operators, franchise cable operators, and so-called wireless cable operators. Accordingly, Associates relies heavily on access to satellite broadcast programming and satellite cable programming as those terms are defined in new Section 628 of Part III of title VI of the Communications Act of 1934. It is the difficulty in obtaining

access per se to that programming from certain vendors and/or at equitable prices that prompts Associates to submit these Comments on the FCC's proposed rulemaking in this proceeding and , in particular, with respect to new Section 628 of the Communications Act.

GENERAL PROGRAM ACCESS ISSUES

As an overriding principle, Associates favors a regulatory approach to general program access that is fair, consistent and unambivalent and that minimizes complaints, thus limiting costly and time-consuming disputes between satellite programming vendors and multi-channel video programming distributors. Accordingly, Associates believes that, among other things, the Commission should: (1) require vertically integrated firms to conduct themselves in a manner similar to non-integrated firms; (2) define "attributable interest" for purposes of vertical integration to the five percent threshold for outstanding voting stock; (3) place harm to consumers in the relevant market as the threshold test when adjudicating complaints involving access to programming and (4) specifically define "harm" to mean the unavailability of specific programming or types of programming oriented or appealing to viewers in the relevant market. Examples might include telecasts of local college and professional sports teams, local newscasts and entertainment programs featuring local talent. For a satellite programming vendor to deny any consumer access to such programming by virtue of refusing to make it available to any and all program distributors in the market in a position to serve him, seems not only to fly in the face of the principle of localism fostered

by the Communications Act of 1934, but also effectively creates an artificial caste system of "have" and "have not" television viewers.

"UNDUE INFLUENCE" IN PROGRAMMING DISTRIBUTION

Associates believes that where there is vertical integration between a cable operator and a satellite cable or satellite broadcast programming vendor, it will be difficult to agree on a scope of activities or practices that constitute "undue influence" and almost impossible for an aggrieved unaffiliated multichannel video distributor to prove wrongdoing. In the vast majority of cases such a distributor is not privy to the private conversations, transcripts of meetings, legal contracts and other agreements between the alleged offending parties. Nor is the distributor usually aware of the prices, terms and conditions of the programming sales to its competitors. For these reasons, Associates favors a simpler and more practical approach to the problem. Briefly, it believes the Commission should prescribe that vertically integrated cable operators have no say in any decision involving the sale of satellite cable programming or satellite broadcasting programming by an affiliated vendor to an unaffiliated multichannel programming distributor. To help to insure compliance, the cable operator and its affiliated vendor might be required by the Commission to certify to the same in writing under penalty of the law on an annual basis. Additionally, the Commission might require the affiliated vendor to include appropriate language in each agreement with an unaffiliated multichannel programming distributor warranting that no

"undue influence" has been exerted by any affiliated cable operator in the pricing, terms or conditions of sale of its programming to that contracting operator.

DISCRIMINATION IN PROGRAMMING DISTRIBUTION

The Commission in seeking comments regarding "discriminating" practices in programming distribution seems to have focused primarily on issues involving pricing differentials. While Associates has encountered such pricing discrimination and will offer not only examples and suggested remedies, it believes there are two distribution practices of overriding concern. The first involves the practice of some vertically integrated satellite cable programming vendors to deny unaffiliated multichannel video distributors access to the vendors' programming by making approval conditional on the approval of their affiliated cable operators who are in direct or indirect competition with the video distributors seeking access. This enables the vendors to avoid any accountability in the instances where the affiliated cable operators reject carriage requests or insist on unreasonable terms and prohibitive prices that render such carriage impossible. A case in point is SportsSouth Network, a regional sports programmer that is majority owned by three of the largest franchise cable operators in the Atlanta area - viz Georgia Cable TV & Communications (GCTV), Wometco Cable TV, Inc. (Wometco), and Scripps Howard Cable Company - and minority owned by Turner Broadcasting System, Inc., whose chairman and principal shareholder controls the Atlanta Braves professional Major League baseball team and the Atlanta Hawks professional NBA basketball team. Primarily in response to the requests of

its subscribers to view the approximately 30 games of the Braves and 20 games of the Hawks telecast each season by SportsSouth, Associates wrote to a senior official of SportSouth Network on April 10, 1992 requesting an affiliation contract. There was no written response to that letter or to a follow-up request on May 12, 1992. On May 27, 1992 the senior official informed Associates he needed more information on the specific properties served by Associates. This was readily furnished to him. Then some 3-4 months later Associates was verbally told by another SportsSouth official that his company would have to clear Associates' carriage of SportsSouth with two of its owners which are franchised to serve the metro Atlanta counties in which Associates operates. Several more months passed and then Associates was informed one of these owners would agree to Associates carrying SportsSouth on a month-to-month basis at a monthly per subscriber price over 40% more than that charged franchise cable operators throughout the entire State of Georgia. There was no way Associates could agree to such an arrangement which, in effect, would permit its competitor to cancel Associates distribution rights at will and to exact such a premium for carriage, particularly considering the fact that Associates must add a satellite dish at each headend site just to receive SportsSouth at a total investment of over $5,000 per site, including processing equipment and a videocipher. Apart from SportsSouth's apparent unwillingness to deal directly and forthrightly with Associates' request for carriage, there is the irony that Associates' metro Atlanta subscribers were effectively denied access to a significant number of the televised games of two of their major professional hometown sports teams. At a minimum, vertically integrated satellite cable programming vendors should be

required to respond in writing and in a timely manner to unaffiliated multichannel video distributors seeking access to their programming and, if access is denied or conditionally granted, the vendors should be required to explain how the public interest is served by such denial or conditions.

The second questionable distribution practice Associates has encountered is having to obtain the programming of vertically integrated national network satellite cable programming vendors through third party distributors which usually charge higher rates and exact more concessions than the vendors themselves do. These third party contracts translate directly into higher operating costs and lower margins, which would be more bearable if these national network vendors sold all their programming through third party distributors or if they did not discriminate between different types of multichannel video distributors within the same industry. Home Box Office (HBO) is a good example of a vendor which has discriminated in both these ways. For years it refused to make its programming available to SMATV operators. When HBO eventually did so several years ago, most SMATV operators, including Associates, were compelled to obtain it from a designated third party distributor at higher rates and on more onerous terms. This is in spite of the fact that many SMATV operators, such as Associates, have more subscribers than some of the franchise cable operators which HBO itself affiliates. Also, within the SMATV industry itself, HBO has favored certain operators by granting them direct programming distribution rights, which appears to be an inconsistent application of its stated policy. To curb these types of discrimination, Associates suggests that the Commission require that a national

vertically integrated satellite cable programming vendor which sells its programming to a multichannel video distributor, whether directly or indirectly through a third party, be required to offer that distributor the option of receiving such programming directly from the vendor.

Pricing, of course, is another area where discrimination is rife insofar as vertically integrated satellite cable programming vendors' business dealings with multichannel video distributors, particularly SMATV operators. Legitimate differences, such as volume and performance discounts, are not the issue here. Even certain concessions to the cable companies which have an equity interest in the vendors might be justified on the basis they deserve special treatment because they are at financial risk. But discrimination which apparently is based solely on the fact a multichannel video distributor is not a franchise cable operator is questionable, if not patently inconsistent with the provisions of The Cable Act of 1992. As a glaring example, consider the significant current basic service monthly per subscriber rate differences, before discounts, charged SMATV operators and their franchise counterparts by the following six vertically integrated satellite cable programming vendors:

Vendor	SMATV Rate	Franchise Rate	Difference $	Difference %
CNN	.41	.28	.13	46
MTV	.31	.22	.09	41
Nickelodeon	.31	.22	.09	41
A&E	.19	.14	.05	36
ESPN	.75	.59	.16	27
TNT	.52	.42	.10	24

Arguments that such rate differences are justifiable because of the higher risk and alleged increased costs associated with the dealing with SMATV operators have not been clearly documented and seem to ignore the many similarities between the SMATV and franchised cable operators in terms of technology, operations and service. Moreover, why penalize one type of multichannel video distributor and not the other because the vendor has experienced problems or incurred extra expenses in certain individual cases. Clearly, these can be handled through other means on an individual basis. For example, if there have been collection problems the operator, be it SMATV or franchise cable, could be required to prepay programming charges, post a letter of credit, etc. And if the satellite cable programming vendor scrambles its signal, as most do, it has the ultimate means of enforcing contractual obligations by simply cancelling the electronic address code that the affiliate requires in order to receive the vendor's signal.

As a simple and practical way of helping to assure that there is no discrimination in the prices, terms and conditions among different multichannel video distributors contracting with satellite cable programming vendors in which any cable operator has an attributable interest Associates believes the Commission should, as a minimum, require the following:

1. That each and every such vendor file its standard rate card for each type of multichannel video distributor with the Commission on an annual basis and whenever the vendor changes any of its rates;

2. That where there are differences in basic service rates before discounts among different types of multichannel video distributors, the vendor explain the reasons for such differences;
3. That each rate card clearly list all volume, performance and other discounts offered by the vendor;
4. That the specified discounts be available to all multichannel video distributors of whatever type with which the vendor does business; and
5. That there be no substantive differences in the vendor's terms and conditions as among multichannel video distributors unless that vendor has on file a statement with the Commission identifying and describing such differences and the reasons why they are necessary.

Additionally, given the foregoing suggested minimum requirements, Associates believes that where there are differences in the vendor's pricing, terms and conditions which have not been disclosed to the Commission, the burden should be on the vendor and not the individual multichannel video distributor to show that they are not discriminatory where the distributor alleges discrimination pursuant to the 1992 Cable Act.

EXCLUSIVE CONTRACTS

The issue of exclusivity has been addressed in new Section 628 of the Communications Act of 1934 in a way that sets forth the criteria to be considered by the Commission in determining whether an exclusive contract is in the public interest, including

the duration of the contract. However, having recognized that exclusive contracts can be and undoubtedly have been, used by cable operators with attributable interests in satellite cable programming vendors to deny the programming of these vendors to other multichannel video distributors, new Section 628 provides for an exemption for prior contracts insofar as they are for areas served by vertically integrated cable operators. So exclusive contracts with cable operators in these areas will be allowed to run their course, which may be some years hence, before they sunset. This is unfortunate because competitors probably need injunctive relief in the short term. Moreover, because the exemption extends to contracts with exclusive distribution rights entered into on or before June 1, 1990, and to unaffiliated cable operators as well as affiliated operators, other multichannel video distributors are left no alternative, but to deal with their competitors. This can prove to be a major problem where the cable operator refuses to sell to its competitor or exacts such a high price and onerous terms for subdistribution rights that it make it virtually impossible for the competitor to be able to afford or to justify such programming. For these reasons, Associates believes the Commission should prescribe that the cable operator with exclusive distribution rights be barred from not extending subdistribution rights to competitors within their service areas and that differences in prices, terms and conditions vis-a-vis the vendors conveying exclusivity to such cable operators be based solely on the additional cost of doing business with competing multichannel video distributors as set forth in their agreements with such distributors. Lastly, Associates is concerned that some cable operators may be able to circumvent the limitation on exemptions for exclusive distribution contracts in new Section

628 by virtue of language in their contracts that confers exclusivity based on not when they were entered into, but rather whether the operator was in operation on or before the exemption cut-off date of June 1, 1990. A case in point is the SportsSouth Network contracts with some or all of its franchise cable system affiliates. These contracts, even though entered into after June 1, 1990 and even though SportsSouth itself was not launched until August 29, 1990, specify that "such licenses and rights shall be exclusive with respect to any System in its Operating Area which is a May 3, 1990 Cable System" defined as "any cable system which was operating as of May 3, 1990 or which had obtained a mandatory cable franchise as of May 3, 1990 which provided the system with an affirmative obligation to serve a specifically delineated geographical area." This kind of contradiction or ambiguity should be addressed specifically by the Commission in the rules which it promulgates.

Respectfully submitted,

NATIONAL CABLESYSTEMS ASSOCIATES

By: _____

Lawrence R. Walz
President
National CableSystems, Inc.
Managing General Partner
2859 Paces Ferry Road
Suite 1110
Atlanta, Georgia 30339

January 22, 1993